UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CA

ABSOLUTE HEALTHCARE D/B/A
CURALEAF ARIZONA **Case 28–CA–267540**

ANISSA KEANE, AN INDIVIDUAL

Katherine E. Leung, Esq., for the General Counsel.
Alan I. Model, Esq. (Littler Mendelson, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on June 15 and 16, 2021, via the Zoom for Government videoconferencing platform. Charging Party filed a charge on October 13, 2020, and an amended charge on December 28, 2020. A complaint and notice of hearing was issued January 20, 2021. The complaint alleged that the Respondent engaged in unlawful activity in violation of Section 8(a)(3) and (1) of the Act (See complaint pars. 5 and 6) by creating an impression that employees were under surveillance, threatened employees with losing tips if they formed a union, promised employees benefits if they did not form a union, and discharging Keane for allegedly engaging in protected and concerted activities. Respondent on February 2, 2021, filed an answer denying that it violated the Act. In its answer Respondent asserted that the Acting General Counsel was acting ultra vires and contrary to *Humphrey's Executor v. U.S*, 295 U.S. 602 (1935).[1] On September 20, 2021, a Notice of Ratification was issued and signed by the General Counsel. A separate Notice of Ratification was signed and issued on December 14, 2021, ratifying the continued prosecution of the complaint and all actions taken after the removal of the former General Counsel. Each Notice of Ratification was served on the parties and is by this reference made part of the official trial record.

At the trial in this matter, the parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On August 4, 2021, the parties filed briefs in the matter. I carefully observed the demeanor of

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[1] The Board has since rejected this very assertion which compels a conclusion that Respondent's arguments surrounding the validity of the appointment of the General Counsel are without merit. See *Aakash, Inc. d/b/a Park Central Care & Rehabilitation Center,* 371 NLRB No. 46 (2021) (relying on *Collins v. Yellen,* 141 S.Ct. 1761 (2021).

witnesses as they testified, and I rely on those observations here. I have studied the whole record, including the post hearing briefs, and based upon the detailed findings and analysis below, I conclude that the Respondent violated the Act essentially as alleged.

FINDINGS OF FACT

JURISDICTION

The complaint alleges, and I find that

1. The charge in this proceeding was filed by Keane on October 13, 2020, and a copy was served on Respondent by U.S. mail on October 14, 2020.

2. The amended charge in this proceeding was filed by Keane on December 28, 2020, and a copy was served on Respondent by U.S. mail on December 29, 2020.

3. At all material times, Respondent has been a corporation with an office and place of business in Gilbert, Arizona (Respondent's facility), and has been engaged in operating a cannabis-related dispensary providing adult use and medical marijuana products for its patients and customers.

4. During the 12-month period ending October 13, 2020, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points outside the State of Arizona.

5. In conducting its operations during the 12-month period ending October 13, 2020, Respondent derived gross revenues in excess of $500,000.

6. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. At all material times, United Food and Commercial Workers Union, Local 99 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

8. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Stephanie Cade	----	Human Resources Manager
Katie Cooke	----	Assistant Store Manager
Tyler Neier	----	General Manager
Tranika Riley	----	Assistant Store Manager
Bryce Scaggs	----	Assistant Store Manager

ALLEGED UNFAIR LABOR PRACTICES

Respondent operates cannabis dispensaries throughout the United States including eight in Arizona. The industry in Arizona is highly regulated with the Arizona Department of Health, Arizona Department of Revenue, Arizona Department of Environmental Services, Weights and Measures as well as the specific city and county regulations applicable to the particular dispensary. Charging Party Anissa Keane was employed by Respondent for approximately 1-1/2 years. She had previously worked 1-1/2 years for Emerald which was acquired by Respondent in June of 2019. In total, she had been employed at the facility for approximately 3 years until her termination of August 28, 2020. At all times while employed at Respondent's facility, she held the position of Bud Tender. As a Bud Tender, she was responsible for selling Marijuana, as well as stocking and cleaning the store.

In November of 2019, she became interested in organizing a union and reached out to officials of the United Food and Commercial Workers Local 99. She called the Union and spoke to a union representative about organizing at the store. She soon thereafter became the head campaigner at the store. She was in direct contact with union officials and began in earnest an attempt to organize the workers at her store. To this end she had conversations with most but not all workers regarding unionizing. The focus of her discussions were the benefits of unionization especially as it related to COVID-19 safety measures. Among the items discussed were the installation of plexiglass, Personal Protective Equipment and hazard pay for the workers who were front line workers with direct face to face customer contacts.

The Employer became aware of her activities and on July 6, 2020, at 12:38 p.m. On this date, Tyler Neier, the general manager emailed Stephanie Cade, the director of human resources for Arizona and advised her, "it was just brought to my attention that Anissa Keane has been talking to some of the Associates about unionizing the dispensary and asking them if they would sign a petition. (GC Exh. 2, p. 11). He sent a copy of the email to Andrew Holstein, Retail Operations District Manager, and Keith Morris, District Manager.

Cade forwarded the email to Greg Fredricks, the vice president of human resources with the question "thoughts on next steps if any?" (GC Exh. 2, p. 10–11). He responded by forwarding the email to Amanda Hargreaves the vice president of human resources for the East Coast, and advising that he was "looping in Amanda, who has been leading the mitigation efforts in the East." His email also contained the question," have we provided managers training for Union avoidance in AZ?" (GC Exh. 2, p. 10.) Cade responded," yes, we have provided the training. It was January." (GC Exh. 2, p. 10.)

Amanda Hargreaves responded to Cade asking, "Can you get some more information from Tyler without him going back and asking the employee? We need to know the context and details of how he found out and from who, what they said, and what the attitude was about it when it was told to us. This will help us determine our response. Also, how many employees work in this dispensary? What's your feeling on

how engaged they are- how many do you think definitely would and would not support it, and anyone you're unsure of." (GC Exh., 2, p. 10.)

Cade Contacted Tyler Neier seeking the information requested by Hargreaves. He responded as follows:

> Kaitlin Cook was told by Jacob Games that Anissa Keane asked him to sign a petition and he said no. Jacob also said that Stephen Berumen stated that he is in favor of unions and would support it. Anissa was approaching it and selling it to Jacob that it would increase wages and benefits for the employees. We have 36 people including myself at the dispensary right now. It's really hard to say how many of them would be for or against it at this point. I know my 3 ASM's and 3 inventory leads would most likely be against it and of course myself. I'm not really sure where the bud tenders would side. Below is a list of all employees at the Gilbert location and where I would think they would side but I have not directly asked anyone and these are all assumptions. (GC Exh. 2, p. 12.)

He attached to the email a table that contained the name of each employee and their position with a separate column titled: "In Favor of Union." The list identified three employees as in favor of the union and five as "maybe." (GC Exh. 2, p. 13.)

Cade communicated this information in an email to Hargreaves stating,

> Kaitlin Cook (ASM Gilbert) was told by Jacob Games (Budtender) that Anissa Keane (Budtender) asked him to sign a petition and he said no. Jacob also said that Stephen Berumen (Budtender) stated that he is in favor of unions and would support it. Anissa was approaching it and selling it to Jacob that it would increase wages and benefits for the employees. We have 36 people in the dispensary right now. It's really hard to say how many of them would be for or against it at this point. Best Guess maybe 5-8 employees out of the 37 would be in favor. This is what Tyler said to me. Let me know your thoughts.

Hargreaves responded by asking Cade to schedule a call to "talk through next steps." (GC Exh. 2, p. 9.)

On July 11, 2020 Kaitlan Cook sent an email to Cade, Cottrell (president), and Holstein, copying Neier, Bryce Skaggs (ASM), and Tranica Reilly (ASM) advising of the following:

> This afternoon an employee disclosed some information about Anissa and what she is trying to accomplish with this union. I was told that she is working with UFCW99 and these are the things she is advocating for:
>
> • Pay be raised to $18/hr. including tips

> • They would like to be paid Hazard Pay and back hazard Pay for the last couple of months.
> • She is saying they can get better insurance for only $10 a paycheck
> • They would like some control over the products that we carry, I am not sure what she means exactly but I would assume she would like to bring in new brands?
> • The last thing she mentioned was wanting Tranica Reilly to take management classes, again I am not exactly sure what she means here just relaying the information I was given.
> This is all the information that she had sent in a text to at least one employee. She also stated that she has 12 of 18 required signatures, I am not sure how many she has now but that is what she told this employee. Please let me know how you would like us to proceed. (GC Exh. 2, p. 1).

In late July 2020, Keane sent an information sheet to her coworkers. (GC. Exh. 2, p. 6–8.) The document was constructed in a question and answer format briefly discussing various topics including: (1)What is a union? (2)What will the union be fighting for in our store? (3) How much union dues will be? (4) What are some of the benefits of unionizing? (5) Will I no longer be able to go to management directly with problems? (6) What is the grievance process? (7) What Union would we be working with? (8) Does every Curaleaf unionize with us? (9) What were those cards that I handed out for you to sign, I did not get a card but I want to contact the union with specific questions? (10) Are there any fun benefits to joining the UFCW99? (GC. Exh. 2, p. 6–8.) The cards referenced in the document referred to union authorization cards which Keane began distributing and collecting for the purposes of filing a petition for a NLRB supervised election.

On July 27, 2020, Neier emailed Stephanie Cade, Andrew Holstein, Keith Morris, Steve Cottrell the president, a document titled: "Union Update" forwarding the Google Doc information. The email noted that "someone sent this . . . and said that Anissa sent it to everyone tonight." (GC Exh. 2, p. 5.)

Sometime before July 29, 2020, employees were notified that they were to attend a mandatory meeting regarding the Union. On July 29, 2020, Skaggs sent an email to all employees "reminding" them "to attend the Union meeting." (GC Exh. 2, p. 3.) On July 31, 2020, Skaggs again sent out a reminder stating, "tomorrow is the Union mandatory meeting noting specifically, "if you are off, you must come to one or the other meetings." (GC Exh. 2, p. 4.)

On July 31, 2020, the meeting which Cade described as an "education meeting" was held at 7 a.m. It was one of two meeting held that day. Present during the meeting was Cade, Holstein, and Neier and approximately 20 other employees. Included among the group of employees was Keane. During the meeting Cade spoke to employees and presented a power point presentation that was prepared by Hargreaves. The power point presentation set forth Curaleaf's official position as follows:

> We feel the union does not provide enough value to account for the cost and lack of flexibility.
>
> Unions and workplace flexibility are often not consistent
>
> Our patients' experiences are not improved due to possible work inflexible rules and work stoppages
>
> No one should have to pay union dues to work for Curaleaf. (GC Exh. 3, p. 2.)

During the power point presentation, she made several statements all of which were designed to sway employees away from supporting the Union. Keane described the statements as follows:

> She discussed how, if we signed the card, we're basically signing away our freedom to talk to management. She talked about how—she talked about how even if we didn't sign the union cards, if the Union went through, we would still all have to become members of the Union. She talked about how the union reps were going to come to our house even without our permission to kind of force us to sign the cards, how the Union was a for-profit place that was only trying to get us organized so they could make money off of us. She talked about how once if we organized and—try to get us better pay, we would lose our tips. (Tr. 61.)

She further recounted that Cade in response to concerns raised by employees about COVID-19 hazard pay indicated that they would receive "better discounts[2]." (Tr. 62.) Lastly she recalled that Cade "did mention that the person trying to organize the Union was just trying to get a job with the Union because she would get paid more. And then she just talked about how once we organized a union, we wouldn't have direct contact with management anymore." (Tr. 62.)

On August 28, 2020, 28 days after the mandatory meeting, Keane was terminated from her employment. The circumstances relating to the termination are not in dispute. On August 23, 2020, Cook informed Keane that she violated the cash handling policy and that she had a $20 discrepancy. (Tr. 38, 68, 147, 149–150; GC Exh. 4.) When advised of the discrepancy Keane expressed concern to Cook inquiring whether she would be fired to which Cook responded that Keane would need to have at least four cash handling problems to be fired. (Tr. 64.) Up to that point in 2020, Keane had not had any cash discrepancy incidents.

On August 28, 2020, Keane was told to meet with Cade in a conference room. During the meeting Cade informed her that because this was her third write up, she would be terminated. Keane advised her that the week prior she was told by Cook that she "would have to have four cash handling problems before [she] was fired." (Tr. 64.)

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[2] In this context "better discounts" referred to employee discounts to purchase marijuana which at the time prior to the statements by Cade were set at 20 percent. (Tr. 66.)

Analysis

1. Cade's promise of increased employee discounts

The promise of benefits to influence an organizing campaign can violate Section 8(a)(1). In *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the court noted that "the broad purpose of section 8(a)(1) is to establish 'the right of employees to organize for mutual aid without employer interference.' *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). We have no doubt that it prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." The Court also noted, "the danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." The Court concluded its reasoning by noting, "the beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective organization from calculated good will of this sort deprives employees of little that has lasting value." Id. 406.

The Board has held that an inference of improper motivation and interference with free choice can be drawn from the evidence presented and from Respondent's failure to establish a legitimate reason for the timing of its actions. *Holly Farms*, 311 NLRB 273, 274 (1993), citing *B &D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439 fn. 2(1990).

Respondent did not offer any legitimate reason for the timing of its promise and instead denied that the statement regarding improved discounts was ever made. In this regard, I credit the testimony of Keane as being truthful in relation to whether the statement was made over the general denials and rationalizations of Cade and Holstein. Moreover, the record established that during her testimony Cade made statements which were demonstrably false. For example, she testified that employees were not required to attend the meeting, however the Employer's own emails show that the meeting was not voluntary. (Tr. 34, GC Exh. 2, p. 4.)

The Union Mandatory Meeting as it was referenced in Skaggs' email to all employees was not a regularly scheduled event but convened in response to the organizing activities of Keane. The meeting was not called by the employees, nor were they given the option of attending. The meeting hadn't been scheduled to discuss employees concerns about COVID-19 safety or hazard pay but rather to express the Company's antiunion position. This occurred at a time after the Employer's surreptitious review of information contained in Keane's private telephonic communications to other employees which revealed that 12 out of 18 required signatures had been obtained by Keane. (GC Exh. 2, p. 1.) There was no showing that the increased discount announcement would have been made at the same time even if there had been no union activity.

A reasonable inference from the context and timing of the promise of a grant of improved employee discounts (during an organizing campaign which was close to obtaining 18 signatures) was that it was an attempt to impinge upon the employee's freedom of choice for or against

unionization. I therefore find that the promise of improved discounts at the Union Mandatory Meeting violated Section 8(a)(1) of the Act.

2. Cade's threat of loss of tips

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969), held that an employer may lawfully communicate to its employees "carefully phrased" predictions based on "objective facts" as to "demonstrably probable consequences beyond his control" that it believes unionization will have on the Company. However, the Court said, if there is "any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him," the statement is a threat of retaliation" which violates Section 8(a)(1). In determining how employees might reasonably construe such communications, the Court emphasized that "the economic dependence of employees on the employer" must be factored into the analysis.

In evaluating whether statements of this kind violate Section 8(a)(1), the Board has long applied an objective standard to determine whether the remark would reasonably tend to interfere with the free exercise of employee rights, without regard to the motivation behind the remark. *American Freightways Co.,* 124 NLRB 146, 147 (1959). See also *Medeco Security Locks v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998) (noting Federal court approval of this standard). Statements that "reasonably communicate the views that a union cannot compel concessions in negotiations [or] guarantee the retention of all present benefits because such benefits are subject to bargaining" and thus "accurately reflect the bargaining process," do not violate Section 8(a)(1). *Pilliod of Mississippi, Inc.,* 275 NLRB 799 (1985).

At the outset it is important to note that Cade denied making the statement that was attributed to her by Keane. I find Keane's version of events to be more credible and believable and therefore credit her version of events. As noted previously, Cade's testimony on several occasions during the hearing was demonstrably false and/or inconsistent with documentary evidence. (Tr. 34, GC Exh. 2, p. 4.) Keane's version of events is also more logically consistent. Keane testified that after the statement about the loss of tips was made by Cade, she challenged her. She testified, "I started speaking up saying that that wasn't true, that I had seen a New York Curaleaf union document and they're able to keep their tips. . . ." (Tr. 61.) It logically follows that Keane would not have challenged the truth of Cade's statement if no such statement was made.

Gissel counsels that economic dependence must be factored into the analysis. In the case of low wage workers, other than the employee's salary, tips often are one of the most important and substantial benefits. Applying the law to the facts presented, as it relates to threats of economic reprisal, it is clear that Cade's comments were not "carefully phrased." She unequivocally told the employees that they "would" lose their tips. This was a clear threat of economic reprisal with a degree of certainty tied directly to unionization. See *President Riverboat Casinos of Missouri Inc*., 329 NLRB 77 (1999) (phrasing of a threat of loss of wages as a "possibility" violated the Act.).[3] I therefore find that the threat that employees would lose tips violated Section 8(a)(1) of

[3] It is important to note that I do not find that Keane's own belief that her challenge to Cade's

the Act.

3. Cade created the impression of surveillance

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, "under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). Accord: *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). The standard is an objective one, based on the rationale that "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257 (1993).

As noted previously, Keane testified that Cade stated during the Mandatory Union Meeting that the person trying to organize the Union was "just trying to get a job with the union because she would get paid more." (Tr. 62.) Cade did not dispute that she made the statement. Evaluating the case against the Board's standards it is important at the outset to note that the statement directly singles out Keane and by its very nature is an expression of animus and an attempt to place her in a negative light with her coworkers calling into question her motivations for attempting to organize.

The statement referenced the organizer as "she," but Cade did not disclose how she knew the organizer was a female. Keane had not disclosed to the Employer that she was organizing but other employees knew because she had directly contacted them. I find that under these circumstances a reasonable employee especially one standing in Keane's shoes would assume from the statement that; (1) the employer knew who the person organizing was and (2) since she didn't tell them it would leave with her an impression of surveillance. An impression that other employees who were aware of Keane's activities would also share. I therefore find that the statement created an unlawful impression of surveillance and violated Section 8(a)(1) of the Act.

4. Keane's discharge

Section 8(a)(3) makes it "an unfair labor practice to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB :1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in addressing alleged violations of Section 8(a)(3). To prove that a discharge violates the Act under *Wright Line*, the General Counsel must initially show that the employee's Section 7

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comments related to collective bargaining somehow insulates Respondent from liability. Prior coercive statements must be specifically disavowed and be accompanied by assurances against future interference with employees' Section 7 rights. *Teksid Aluminum Foundry*, 311 NLRB 711 fn. 2 (1993). Cade denied any statement was made and the record is devoid of any effort to disavow the statement.

activity was a motivating factor in the employer's decision to discharge the employee. The elements required to support this initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee's protected conduct. *Wright Line*, 251 NLRB at 1089; see also Manno Electric, 321 NLRB 278, 280 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997), *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019) (initial burden requires evidence of animus to support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action). Under certain circumstances, animus may be inferred from circumstantial evidence based on the record as a whole. See *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992), *Electrolux Home Products*, 368 No. 34 (2019). Evidence is probative of unlawful motivation only if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline. *General Motors LLC*, 369 NLRB No. 127 (2020).

It is undisputed that Keane engaged in union activity, the employer was aware of that activity and Keane was discharged. Thus, the first two elements of the prima facie case have been met. The record also provides sufficient evidence of animus to establish the third element. Singling out Keane to malign her motivations for engaging in organizing efforts standing alone is sufficient evidence of animus directly related to her union activities. The three unfair labor practice violations cited above viewed collectively are sufficient in and of themselves to establish the requisite animus given their direct connection to union activity. In addition, the timing of her discharge is sufficient in and of itself to establish the requisite animus. The discharge was in fact effectuated less than a month after the Mandatory Union Meeting a timeframe in which the "temporal proximity" provides evidence of a causal link between the employee's union activity and loss of employment. *Velox Express, Inc*. 368 NLRB No. 61 (2019), *Napoleon Cadillac of Libertyville*, 367 NLRB No. 6 (2018).

Further evidence of animus can be inferred from the disparate treatment she was afforded. Cade, without hesitation, set forth her version of company policy stating, "you get three chances with us and then it results in termination after that." (Tr. 38.) This directly conflicted with what Keane was told by her supervisor. (Tr. 64.) It also conflicts with the documentary evidence of record. In fact, one employee who had five cash handling infractions within a matter of 2 months (including not one but two $20 violations) was not terminated and was only placed on final warning status. (GC Exh. 5.) On the other hand, Keane who had not had any incidents during the entirety of 2020 prior to the $20 error was terminated. The stark difference in treatment is readily apparent. This disparate treatment alone and in conjunction with the other evidence of animus is sufficient to establish the final element of the prima facie case. See *Golden State Foods Corp.,* 340 NLRB 382, 384–386 (2003)(finding unlawful termination where employer seized upon reasons for discharge as a pretext for retaliating against employee because of union activism), see also *Healthcare Emps. Union Local 399 v. NLRB*, 463 F.3d 909, 922 (9th Cir. 2006) (evidence suggested that the employer "seized upon a pretext to mask an anti-union motivation)."

Having established a prima facie case, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee

had not engaged in protected activity. *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). In is not sufficient for an employer to merely present a legitimate reason for its action. It must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020). "In other words, a respondent must show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so." Id.

I find that Respondent has failed to meet its burden. Although it is true that the industry is highly regulated and cash handling policies and procedures may differ from other retail establishments, Respondent failed to meet its burden of persuasion given the stark evidence of disparate treatment of at least another employee. Applying the same standards to Keane that were applied to at least one other employee suggests that but for her union activity she would have been afforded at least five opportunities to improve before even being given a written warning. Considering these facts, Respondent's arguments surrounding its reliance on policy related to strict regulatory requirements as justification for its actions falls short of meeting its burden. See *Limestone Apparel Corp.,* 255 NLRB 722 (1981). See *Hobson Bearing International*, 365 NLRB No. 73, slip op. at 1 fn. 1 (2017) (if the General Counsel makes his/her initial case, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Sec. 7 activity). I therefore find that the discharge of Keane violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent's actions of terminating the Charging Party violated Section 8(a)(3) and (1) of the Act.

2. Respondent's threat to employees that they would lose their tips if they formed a union violated Section 8(a)(1) of the Act.

3. Respondent's promise of benefits to employees if they did not form a union violated Section 8(a)(1) of the Act.

4. Respondent's actions created an impression of surveillance when it singled out the sole female organizer and violated Section 8(a) (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition, Respondent must also make Anissa Y. Keane whole for any loss of earnings and other benefits incurred a result of Respondent's unlawful discharge of her. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93(2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate the employee for her reasonable search-for work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings.

Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[4]

Additionally, the Respondent shall compensate Anissa Y. Keane for the adverse tax consequences, if any, of receiving a lump sum backpay award, in accordance with *Don Chavas LLC d/b/a Tortillas Don Chavas`*, 361 NLRB 101 (2014), and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director for Region 28 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

I also find that special remedies are required to dissipate the detrimental and lingering effects of the Respondent's unfair labor practices. The Board has long recognized that such unlawful terminations are destructive to Section 7 rights because they tend to instill fear in the remaining employees that, "they will lose their employment if union activity persists." *A.P.R.A. Fuel Oil,* 309 NLRB 480, 481 (1992), enfd. 28 F.3d 103 (2d. Cir. 1994). This is especially true in cases such as this when the person terminated is the sole union organizer.

I shall order the Respondent to have the attached notice read aloud to the employees so that they "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), review denied 400 F.3d 920, 929–930 (D.C. Cir. 2005). The Board has long held that the "public reading of the notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance."' *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. 107 F.3d 923 (D.C. Cir. 1997). Reassurance to employees that their rights under the Act will not be violated by the Respondent is of paramount importance given the timing of the unfair labor practices in relation to the organizing efforts of Keane, the sole union organizer. I shall accordingly order the Respondent, during the time the required notice is posted, to convene the unit employees during working time at its Gilbert Arizona facility and have Cade (or, if she is no longer employed by the Respondent, by an equally high-ranking management official), in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, read the notice aloud to employees or, at the Respondent's option, permit a Board agent, in the presence of Cade to read the notice to the employees. See *Bozzuto's, Inc.*, 365 NLRB No. 146, slip op. at 5 (2017). During the reading of the notice, Cade (or, if she is no longer employed by the Respondent, by an equally high-ranking management official), shall advise any affected employee if during the surreptitious gathering of information

[4] The Board has yet to determine whether consequential damages would be a necessary component of make-whole relief and I have not included such as the question is still pending before the Board. See *Thryv, Inc.*, 371 NLRB No. 37 (2021).

from Keane's private telephonic communications any employee's identity and/ or communications regarding union activity with Keane were revealed to Respondent.

I shall additionally order the Respondent to give notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees on the question of union representation. I order these special remedies considering the significant and damaging nature of the Respondent's unfair labor practices and the need to assure employees a free and fair choice regarding union representation. See *Monfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part 965 F.2d 1538 (10th Cir. 1992); *United Dairy Farmers Cooperative Assn.*, supra, 242 NLRB at 1029.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Absolute Healthcare d/b/a Curaleaf Arizona, [Gilbert, Arizona] its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising increased benefits including improved employee discounts to discourage employees from selecting union representation.

(b) Creating the impression among employees that their union activities are under surveillance.

(c) Threatening employees with loss of tips if they choose to be represented by the union.

(d) Discharging or otherwise discriminating against employees for supporting the union or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Anissa Y. Keane full reinstatement to her former job, or, if that job credibly no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Anissa Y. Keane whole for any loss of earnings and other benefits suffered, and search-for-work and interim employment expenses incurred, because of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Anissa Y. Keane for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

(d) Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 28 a copy of a report allocating the backpay awards to the appropriate calendar years for the affected employee.

(e) File with the Regional Director for Region 28 a copy of the backpay recipient's corresponding W-2 forms reflecting the backpay award.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Remove from Respondent's files, any and all records of the discharge of Keane and within 3 days thereafter, notify Keane in writing that the action was taken, and that the materials removed will not be used as a basis for any future personnel action against her or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her.

(h) Within 14 days after service by the Region, post at its facility in Gilbert, Arizona copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2020.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Convene a meeting at its Gilbert Arizona facility during working time, scheduled to ensure the widest possible attendance, at which the notices to employees will be read to all employees, supervisors and managers in accordance with the order set forth above.

(j) Give the Union notice and equal time and facilities to respond to any address made by Respondent to employees regarding the issue of union representation.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 8, 2022.

Dickie Montemayor
Administrative Law Judge

APPENDIX A

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT make it appear that we are watching you engage in union activities on behalf of United Food and Commercial Workers Union, Local 99 (the Union) or any other labor organization.

WE WILL NOT threaten you with losing your tip compensation if you unionize.

WE WILL NOT promise you benefits in order to stop you from unionizing.

WE WILL NOT fire you because of your union membership, activities, sympathies, and/or support for the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer ANISSA Y. KEANE (KEANE) immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without any loss to her seniority rights or any other privileges previously enjoyed because we discharged her.

WE WILL make whole KEANE for any loss of earnings and other benefits resulting from her termination, less any interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL file with the Regional Director for Region 28 copies of W-2 forms reflecting KEANE'S backpay award.

WE WILL within 14 days, remove from our files, any and all records of the discharge of KEANE and WE WILL within 3 days thereafter, notify KEANE in writing that we have taken this action, and that the materials removed will not be used as a basis for any future personnel action against her or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her.

ABSOLUTE HEALTHCARE d/b/a CURALEAF ARIZONA

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation, and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

2600 North Central Avenue -Suite 1400
Phoenix, AZ 85004-3099

Telephone: (602)640-2160
Hours of Operation: 8:15 a m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/28-CA-267540 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (602) 416-4755.